BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF:

Unbundled Access to Network Elements	**)**	**WC Docket No. 04-313**
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	**)**	**CC Docket 01-338**

COMMENTS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION

Minnesota Public Utilities Commission
121 7th Place East
Suite 350
St. Paul, Minnesota 55101

October 4,2004

I. Executive Summary

The Minnesota Public Utilities Commission (MPUC) is the state governmental agency charged with the regulation of telecommunications carriers and the provision of service in Minnesota. The MPUC's responsibility also includes support for federal rules that are in the best interest of Minnesota citizens. The MPUC, like the FCC, is a regulatory agency that has overseen the evolution of competition since the passage of the Telecommunications Act of 1996 (the Act). The MPUC provides these comments in response to the Federal Communications Commission (FCC) Notice of Proposed Rulemaking in WC Docket No. 04-313 and CC Docket No. 01-338. These comments underscore the need to promote competition and protect consumers under the regulatory framework defined by the FCC through its rules.

The MPUC urges the FCC, through its development of alternative unbundling rules, to recognize the important role of state commissions in guiding the development of competitive markets in their states. Further, the MPUC urges the FCC to acknowledge both the distinct jurisdiction of state commissions and the value gained by allowing state commissions to participate in the developmental process, such as rulemaking and price setting, needed to achieve competitive markets within each state. Federal law and Minnesota state law grant authority to the MPUC, in its role as the regulatory agency for the state, to oversee the competitive activities of telecommunications providers. Attachment A shows various Minnesota State statutes that direct the MPUC to promote and regulate, as necessary, the development of competition and protection of consumers.

The FCC's Order and Notice of Proposed Rulemaking (Order and Notice) solicits comments on various topics and the MPUC provides a limited response that focuses on its primary concerns for the maintenance and promotion of competitive markets in Minnesota. The MPUC seeks rules that grant it a definitive role in making determinations on unbundling obligations and unbundled network element pricing. In addition, and in light of the limited market analysis currently available to the FCC, the states should be granted a role in conducting market analysis within each state that is compliant with the rulings by the courts. Finally, the MPUC argues for a reasoned and non-disruptive transition from UNE-P access to access of a more limited array of network elements over time.

II. States Role in Promoting Competition and Customer Choices

Current information on competition in the State of Minnesota shows that effective competition does not exist in all areas of the state and customer alternatives are not universally available. The information available to the MPUC, including the impairment analysis performed in response to the FCC's initial Triennial Review Order[1] (initial TRO) shows that numerous competitive alternatives exist for businesses primarily in the St. Paul and Minneapolis seven county metro area.[2] For non-metro areas, which include rural areas and small towns and cities, access to competitive alternatives are far more limited.

The success of local competition thus far has been achieved through the availability of loops, transport and switching at cost based rates. Price-setting authority by states was conferred on the states by the Act and confirmed by the U.S. Supreme Court. The FCC, in its Order and Notice, seeks to adjust state determined prices for at least an interim period. The MPUC strongly disagrees with any proposal or ruling by the FCC to usurp this authority.

The FCC's initial TRO established a framework for states to make impairment determinations regarding mass market switching, high capacity loops, and dedicated transport. Although the D.C. Circuit Court subsequently ruled in USTA II to vacate and remand various unbundling rules adopted in the initial TRO, the MPUC opened a proceeding to conduct the, then in effect, impairment analysis as outlined in the initial TRO. Qwest elected at that time not to challenge, in Minnesota, the FCC's national impairment determination for high capacity loops and dedicated transport.

Certainly there are diverse opinions on whether the impairment analysis outlined in the initial TRO represents a flawed approach. Significantly however, the MPUC believes that Qwest's decision to not attempt to demonstrate non-impairment for high capacity

---

[1]Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

[2]The seven county metro area includes the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington.

loops and dedicated transport in Minnesota to be more than simply anecdotal evidence of the status of competition in Minnesota. While the MPUC disagrees with the D.C. Court's remand decision in USTA II, the MPUC urges the FCC to adopt an impairment analysis framework that allows the MPUC to participate and have a significant role in assisting the FCC with those decisions. For example, conducting an evidentiary proceeding specific to the Minnesota markets and UNEs would be an appropriate vehicle for the MPUC to participate and assist the FCC in a granular impairment analysis of network elements. In this scenario and consistent with the D.C. Court's remand, the FCC would not delegate the ultimate impairment decision to the states.

III. Premature Elimination of UNE Access Would be Detrimental to Competitors and End Users

On June 26, 2003, the FCC granted Qwest's request under 47 U.S.C. § 271 to provide intrastate interLATA toll service in Minnesota.[3] In its Order, the FCC lauded the efforts of the MPUC in opening up the local exchange network to competition.

As a result of the MPUC's policies, CLECs currently serve roughly 19% of Minnesota's end-user switched access lines. This success was only possible as a direct result of the availability of loops, transport and switching as unbundled network elements at forward looking cost based rates. This availability did not result from Qwest voluntarily opening its market to competitors, but from legal and regulatory obligations enforced by the MPUC. Without such compelling forces, there would be little if any local competition in Minnesota today. As such, it is crucial that the FCC and state Commissions continue to ensure access to these basic network elements at forward looking cost based rates subject to a reasonable and thorough impairment analysis.

As a condition of getting 271 authority Qwest had to demonstrate that its market was irreversibly opened to competition. Included in this demonstration was a showing by Qwest that various UNEs are available at specific TELRIC based prices. The FCC granted approval of Qwest's request for section 271 authority which was based on MPUC approved rates for UNEs. If the FCC turns its back on the record basis for its Qwest 271 Minnesota decision, it may be

[3]Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region InterLATA Services in Minnesota*, WC Docket No. 03-90, (Released June 26, 2003).

Minnesota telecommunications customers who are ultimately short changed. As a result, the irreversibility of Qwest's market being open to competition may in fact be reversed and the 271 decision a dubious result.

In Minnesota, a demonstration has been made that the CLEC industry relies heavily on Qwest to provide UNEs. As such, if the FCC determines that there is no impairment without seeking MPUC input to judge whether impairment exists, a transition period should be extended to avoid the likely disruption in competition in the local exchange telecommunications industry. The MPUC believes that eliminating UNE access without a fair determination whether impairment exists will be a major setback for competition in the State of Minnesota. Further, without a fair and reasonable impairment analysis, or in the alternative an extended period of transition, local exchange competition will have been just a promising experiment that was cut short prior to fulfilling its promise.

IV. UNE Pricing at Cost

In order to make competition viable, UNE rates must be based on forwarding looking economic cost. These are the costs the incumbent experiences when it puts services together for its retail offerings. The incumbent does not experience a so called "market based" price when it puts together its retail service. In fact, currently a "market based" price is nothing more than a more pleasing way of saying monopoly price. It is the price the incumbent who is the market chooses to set in order to achieve various objectives. The FCC should not allow itself to be deceived by such labels.

If the Commission allows a "market based" pricing approach for UNEs required under section 271, the Commission will have taken a direction which flies in the face of competitive neutrality which has been espoused in both state statutes and federal law. Given that "market based" priced UNEs are set by a vertically integrated monopoly for its competitors, implies that the rate is a monopoly price that cannot be determined to be just, reasonable, and nondiscriminatory. As long as there is a single supplier of UNEs, the rates must have a cost basis in order to be judged just and reasonable. Absent the existence of competitive supply for UNEs, the rates for UNEs must be based on cost. To do anything else, would prematurely allow an imperfect market to control the development and destiny of local exchange competition.

Cost based rates based on forward looking economic costs were essential to the development of local exchange competition and should continue until alternatives become readily available. While competition has developed at a

satisfactory pace since the enactment of the Telecommunications Act of 1996, competitors are still fragile and highly dependent upon the incumbent LEC for the provision of cost-based UNEs. To move away from such pricing at this point would provide the appearance that the Commission is abandoning competitive supply for local exchange telecommunications service.

V. Competitive Impairment in Non-metro Areas

Section 251 (f)(1) of the Act recognizes the unique nature of customer markets in rural areas. Rural telephone companies can seek exemption from unbundling obligations if it is determined that doing so would be unduly economically burdensome or technically infeasible. The exemption is limited to local exchange carriers with fewer than 2 percent of the Nations subscriber lines.[4] Recognition of the market limitations that make it uneconomic for an incumbent LEC to unbundle and interconnect with competitors in rural areas can also be conferred on competitive LECs intent on serving rural markets.

While incumbent LECs with fewer than two percent of the Nations subscriber lines can seek an exemption, Qwest, the Bell operating company providing service to the majority of access lines in the State of Minnesota, would not have that option. Qwest serves many customers in small and medium sized towns and cities in the non-metro areas of the State and competitive LECs are entering those markets, albeit with more limited success. In many cases, Qwest would be the only source for the network elements that a competitor would need to serve its end users. Objective, competitive measures can be obtained by looking at such things as the number of carriers, the number of lines served and the number of switches being deployed.

The FCC should recognize the unique nature of the non-metro area markets, consistent with the Act, and establish a framework for interconnection and unbundling obligations for non-metro areas that deserve such treatment. Absent special consideration in the forthcoming FCC rules for the less populated areas of states, the result will be higher consumer costs and more regulation to protect customers in those areas.

VI. Transition From UNE Access to Competitor Facilities

The MPUC supports a transitional system that allows existing competitive choices for customers to continue. A transition system should include a sufficient time frame to accommodate competitor migration to alternative facilities and also limited pricing adjustments to minimize the impact on end users. For many competitors, there has been an evolution in how their customers have been served. Initially, service began with the resale option that allowed competitors to acquire customers without the risk of disrupting a customer's services which also limited the competitor's profit potential. The

[4] Section 251(f)(2) of the Act.

next phase in the evolution for competitors was to provide service using UNE-P that continued to minimize any possible disruption of customer's service with expanded profit potential. Today, the telecommunications market is characterized by many facilities-based competitors that can mix their network facilities with the incumbent LEC to provide enhanced services with expanded revenue and profit potential. The next phase in this evolution will be a significant reduction in access to the incumbent LECs network facilities at fair and reasonable, cost-based prices.

The MPUC is concerned that the significant gains to date in terms of competitive alternatives for customers will revert back to fewer choices and higher prices unless the transition is managed to minimize the end user impacts. The FCC's Order and Notice seeks comments on how the UNE access alternative could be replaced by such things as tariffed or other service arrangements. The MPUC is concerned that tariffed rates would not be cost effective for a competitor to replace the loop and transport UNEs. Regulation of Qwest's tariff prices no longer involve the same level of scrutiny that they once were in the advent of legislative price deregulation. Similarly, adopting market-based pricing for UNEs such as loops and transport, where there are no other alternatives, would disrupt the market and invoke additional regulatory intervention.

A transition to unbundling rules that emphasize facilities-based competition should recognize the time needed for competitors to re-engineer their networks, order and install equipment, and facilitate customer migrations to alternative arrangements. Consideration should also be given to the different metro and non-metro market areas to recognize that the existing network infrastructure deployment varies significantly between those geographic areas.[5] A longer transition period and/or even more limited pricing adjustments would help retain competitive choices in non-metro areas. The FCC, in its initial TRO adopted a three year transition period for line sharing obligations of incumbent LECs. The MPUC considers a transition period of this duration to be reasonable for most if not all access obligations of incumbent LECs.

A longer transition period also allows both the incumbent LEC and the competitive LEC to evaluate through commercial negotiations, the alternatives available to them. As some in the telecommunications industry have noted, providing telecommunications network element access is becoming more of a commodity business that provides competitors with more pricing, network and engineering design flexibility. In light of the elimination of the pick and choose option for interconnection agreement terms, a longer

[5]The MPUC is aware that various non-metro competitors faced with slow customer acquisitions have recently purchased switches and begun laying fiber cable in their effort to remain viable competitors in light of their limited market opportunities.

transition period will facilitate interconnecting parties' consideration of their commercial alternatives and their ability to successfully negotiate a commercially viable agreement.

VII. Conclusion

The MPUC appreciates the opportunity to submit comments to the FCC on the important goal of promoting competition in the local telecommunications market. Eliminating access to UNE's on a flash cut basis with no market analysis and no transitional mechanisms would be devastating to the burgeoning competitive local exchange market. New services and new technologies have emerged in conjunction with the development of competitive alternatives for consumers. The MPUC urges the FCC to maintain a focus on the markets and how they are developing in its efforts to create legally sustainable rules. The MPUC believes that the perspectives of state commissions will benefit the competitive evolution of local competition and hopes these comments will be helpful to the FCC as it develops rules in conformance with the directives of the 1996 Telecommunications Act.

Respectfully submitted,

LeRoy Koppendrayer,
Chairman
Minnesota Public Utilities Commission

237.011 Telecommunications goals.

I. The following are state goals that should be considered as the commission executes its regulatory duties with respect to telecommunication services:

(1) supporting universal service;

(2) maintaining just and reasonable rates;

(3) encouraging economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission;

(4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;

(5) maintaining or improving quality of service;

(6) promoting customer choice;

(7) ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service; and

(8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.

237.081 Investigation.

Subdivision 1. Commission investigation. Whenever the commission believes that a service is inadequate or cannot be obtained or that an investigation of any matter relating to any telephone service should for any reason be made, it may on its own motion investigate the service or matter with or without notice, except that the commission shall give notice to a telephone company before it investigates the level of rates charged by the company.

237.121 Prohibited practices.

I. (a) A telephone company or telecommunications carrier may not do any of the following with respect to services regulated by the commission:

(1) upon request, fail to disclose in a timely and uniform manner information necessary for the design of equipment and services that will meet the specifications for interconnection;

(2) intentionally impair the speed, quality, or efficiency of services, products, or facilities offered to a consumer under a tariff, contract, or price list;

(3) fail to provide a service, product, or facility to a consumer other than a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the commission's rules and orders;

(4) refuse to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the commission's rules and orders;

(5) impose unreasonable or discriminatory restrictions on the resale of its services, provided that:

(i) it may require that residential service may not be resold as a different class of service; and

(ii) the commission may prohibit resale of services it has approved for provision for not-for-profit entities at rates less than those offered to the general public; or

(6) provide telephone service to a person acting as a telephone company or telecommunications carrier if the commission has ordered the telephone company or telecommunications carrier to discontinue service to that person.

(b) A telephone company or telecommunications carrier may not violate a provision of section 325F.693, with regard to any of the services provided by the company or carrier.

237.60 Discriminatory practices; service costs.

Subd. 3. Discrimination. No telephone company shall offer telecommunications service within the state upon terms or rates that are unreasonably discriminatory. No telephone company shall unreasonably limit its service offerings to particular geographic areas unless facilities necessary for the service are not available and cannot be made available at reasonable costs. The rates of a telephone company must be the same in all geographic locations of the state unless for good cause the commission approves different rates. A company that offers long-distance services shall charge uniform rates and charges on all long-distance routes and in all geographic areas in the state where it offers the services. However, a company may offer or provide volume discounts in connection with intrastate long-distance services and may pass through any state, municipal, or local taxes in the specific geographic areas from which the taxes originate. Nothing in this subdivision authorizes a telephone company to provide service outside of its authorized service area except as provided in section 237.16.

Subd. 4. Cost of service. Prices or rates charged for competitive services must cover the incremental costs of providing the service. If a telephone company provides both local service and long-distance services, that company shall, in determining the cost of the long-distance service, include at least the same level of contribution to common and joint costs as is contained in the access charges to other telephone companies. The company may do so on an aggregate basis, instead of on a time or mileage band basis.